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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JUAN CARLOS CARDENAS-CUEVAS,	
Plaintiff and Respondent,	G055921
v.	(Super. Ct. No. 30-2017-00935794)
ARBONNE INTERNATIONAL, LLC,	O P I N I O N
Defendant and Appellant.	

Appeal from an order of the Superior Court of Orange County, Derek W. Hunt, Judge. Reversed and remanded with directions.

Snell & Wilmer, Christy D. Joseph, Todd E. Lundell and Amina Mousa for Defendant and Appellant.

C&B Law Group and Jack Bazerkanian for Plaintiff and Respondent.

After being fired from his job at Arbonne International, Inc. (Arbonne), respondent Juan Carlos Cardenas-Cuevas (respondent) filed the instant wrongful termination and discrimination suit against Arbonne. Arbonne responded with a motion to compel arbitration, which the trial court denied based on a finding the arbitration agreement at issue was procedurally unconscionable and unenforceable in its entirety.

Arbonne appeals from the order denying the motion to compel arbitration. It argues: (1) the trial court erred in determining the arbitration agreement was unenforceable without finding any substantive unconscionability; (2) the arbitration agreement is not procedurally or substantively unconscionable; and (3) if we find any provision of the arbitration agreement substantively unconscionability, we should either sever that provision ourselves or remand for the trial court to decide whether to sever it.

We conclude: (1) the arbitration agreement is procedurally unconscionable; (2) one of the challenged provisions in the arbitration agreement is substantively unconscionable, but the other is not; and (3) the trial court did not consider whether the substantively unconscionable provision, by itself, warranted nonenforcement of the entire arbitration agreement. Thus, we remand with directions for the trial court to exercise its discretion and decide whether to sever the substantively unconscionable provision.

FACTS

The events giving rise to this lawsuit occurred towards the end of respondent's roughly 11-year tenure as an employee of Arbonne. According to the complaint, one of Arbonne's employees backed a forklift into respondent, injuring his heel. Respondent reported the injury to his supervisors. Within days, he was fired.

Believing Arbonne wrongfully terminated him because of his heel injury-related disability, respondent filed suit seeking compensatory and punitive damages, lost earnings, statutory civil penalties and injunctive relief. The complaint alleged causes of action grounded upon the Fair Employment and Housing Act (Gov. Code, § 12960 et seq.) (FEHA), the Labor Code, the California Family Rights Act, and public policy.

Arbonne answered and moved to compel arbitration pursuant to a three-page "Employee's Acknowledgement and Acceptance" (Arbitration Agreement) signed by respondent almost four years before his termination. The Arbitration Agreement required binding arbitration under the Federal Arbitration Act (FAA), in accordance with the procedures set forth in the California Arbitration Act (California Code of Civil Procedure Section 1280 et seq., including Section 1283.05, and all other mandatory and optional discovery rights established by this act)." (Italics omitted.)

Respondent opposed the motion to compel arbitration. He did not deny he had signed the Arbitration Agreement, nor did he challenge the accuracy of the English translation of the original Spanish document. Instead, he argued that the Arbitration Agreement was procedurally and substantively unconscionable and unenforceable.

As to procedural unconscionability, respondent explained in a declaration that one day, his supervisor "called multiple employees for a meeting and asked them to sign some documents." She told him he would not be allowed to return to work the next day if he did not sign them. He signed them without having the opportunity to read them or discuss them with anyone because his supervisor rushed him to sign and return to work. According to respondent, he never received a copy of the Arbitration Agreement.

With respect to substantive unconscionability, respondent focused on a clause in the Arbitration Agreement which provided that by signing he "agree[d] to waive any substantive or procedural rights . . . to bring any class, collective, private attorney general, representative or any other action on a similar basis." As for procedural unconscionability, respondent argued: an employee's waiver of a private attorney general action is unenforceable as a matter of law under *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348 (*Iskanian*); the same was true of a bar on class-wide arbitration under *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165 (*Ingle*); and those two "unlawful" provisions rendered the Arbitration Agreement unenforceable.

The trial court denied the motion to compel arbitration.

DISCUSSION

"'"[T]he doctrine of unconscionability has both a procedural and a substantive element, the former focusing on oppression or surprise due to unequal bargaining power, the latter on overly harsh or one-sided results."' [Citation.]" (*Baltazar v. Forever 21, Inc*. (2016) 62 Cal.4th 1237, 1243 (*Baltazar*).) Generally, both elements "'"must . . . be present in order for a court to exercise its discretion to refuse to enforce a contract or clause . . . ." But they need not be present in the same degree. "Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves." [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa.' [Citation.]" (*Id.* at pp. 1243-1244.)

"'[T]here are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability. . . . Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum. [Citation.] Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced [citation], contain a degree of procedural unconscionability even without any notable surprises, and "bear within them the clear danger of oppression and overreaching." [Citation.]' [Citation.] . . . [C]ourts must be 'particularly attuned' to this danger in the employment setting, where 'economic pressure exerted by employers on all but the most sought-after employees may be particularly acute.' [Citation.]" (*Baltazar, supra*, 62 Cal.4th at p. 1244.) "'[A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinize the substantive terms of the contract to ensure they are not manifestly unfair or one-sided. [Citation.]'" (*Ibid*.)

The substantive aspect of "'[t]he unconscionability doctrine ensures that contracts, particularly contracts of adhesion, do not impose terms that have been variously described as '"'"overly harsh"'"' [citation], "'unduly oppressive'" [citation], "'so one-sided as to "shock the conscience"'"' [citation], or "unfairly one-sided" [citation].'" (*Baltazar, supra,* 62 Cal.4th at p. 1244.) There is no conceptual difference among these formulations. They all "'point to the central idea that the unconscionability doctrine is concerned not with "a simple old-fashioned bad bargain" [citation], but with terms that are "unreasonably favorable to the more powerful party" [citation].'" (*Ibid.*) "'The ultimate issue in every case is whether the terms of the contract are sufficiently unfair, in view of all relevant circumstances, that a court should withhold enforcement.' [Citation.]" (*Id.* at p. 1245.) Absence conflicting extrinsic facts, a trial court's unconscionability determination presents a question of law subject to de novo review. (*Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 247.)

1. Procedural Unconscionability

Arbonne contends the Arbitration Agreement is not procedurally unconscionable, while respondent contends it is. We agree with respondent.

The procedural unconscionability evidence was undisputed. Respondent was called into his supervisor's office one day while working. She handed him a document and said he would not be allowed back to work the following day if he did not sign it. He signed it without the opportunity to read it because she rushed him to do so and to resume his work duties.

These facts evidence a type of procedural unconscionability commonly found in the employment context. (See, e.g., *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83 (*Armendariz*); *OTO, L.L.C. v. Kho* (2017) 14 Cal.App.5th 691, 708; *Jones v. Humanscale Corp.* (2005) 130 Cal.App.4th 401, 415; *Nyulassy v. Lockheed Martin Corp.* (2004) 120 Cal.App.4th 1267, 1284 (*Nyulassy*); *Fitz v. NCR Corp.* (2004) 118 Cal.App.4th 702, 722.)

The Arbitration Agreement was a contract of adhesion, offered on a take-it-or-leave-it basis with no possibility of negotiation. It was presented to respondent in a manner that gave him no meaningful opportunity to consider its terms and reflect on the rights he would be giving up by signing it. This aspect of Arbonne's procedure is even more egregious than that which was found by the Supreme Court to be procedurally unconscionable in *Armendariz*. (*Armendariz, supra*, 24 Cal.4th at pp. 114-115 [finding procedural unconscionability based solely on adhesiveness of agreement].)

Arbonne defends the procedure it used, noting the Arbitration Agreement signed by respondent clearly indicated his signature constituted agreement to arbitrate all disputes between them. It points to the following sentences which appear on the top of the signature page: "MY SIGNATURE BELOW CERTIFIES THAT I HAVE READ, UNDERSTAND AND ACCEPT ALL OF THE ABOVE TERMS, AND I AGREE TO BE LEGALLY BOUND THERETO. I ALSO UNDERSTAND THAT THIS AGREEMENT REQUIRES ME TO SUBMIT TO ARBITRATION ALL DISPUTES ARISING FROM MY EMPLOYMENT."

While that type of plain disclosure might reduce the degree of procedural unconscionability in certain situations (see, e.g., *Nyulassy, supra*, 120 Cal.App.4th at pp. 1283-1284), it could have no such effect here, because respondent was not given any time to read the Arbitration Agreement. So, from a procedural standpoint, it matters not what disclaimers and warnings the Arbitration Agreement itself provided. (*Kinney v. United HealthCare Services, Inc.* (1999) 70 Cal.App.4th 1322, 1329-1330 (*Kinney*).)

The cases cited by Arbonne are inapposite for the same reason. They all concern enforcement of a contract against a signatory who claims to be unfamiliar with its terms despite having had an ample opportunity to review them. But failing to review a document when given a sufficient opportunity to do so is fundamentally different than failing to review a document because no such opportunity to do so is allowed.

Thus, we hold the Arbitration Agreement is procedurally unconscionable.

2. Substantive Unconscionability

Arbonne contends the Arbitration Agreement is not substantively unconscionable. Respondent contends it is substantively unconscionable because: (a) it contains a waiver of claims under the Private Attorneys General Act of 2004 (PAGA); and (b) it categorically bars arbitration on a class-wide basis.[1] He relies on the Arbitration Agreement clause which provides: "By signing below, I agree to waive any substantive or procedural rights I may have to bring any class, collective, private attorney general, representative or any other action on a similar basis."

Arbonne does not dispute this clause denies respondent the right to bring PAGA and class-wide claims, but instead disputes the legal significance of these waivers. Regarding the PAGA waiver, Arbonne concedes it is against public policy and unenforceable under *Iskanian* (a case decided after the Arbitration Agreement was signed), but argues this does not mean it is substantively unconscionable. We disagree.

It is true: "Contracts can be contrary to public policy but not unconscionable [citation] and vice versa [citation]." (*Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, 686-87 (*Sonic-Calabasas*), cert. granted, judgment vacated on other grounds, (2011) 565 U.S. 973; see *Securitas Security Services USA, Inc. v. Superior Court* (2015) 234 Cal.App.4th 1109, 1123 ["whether an agreement has been validly formed, and whether its terms are adhesive or unconscionable . . . are different from the determination of whether [the employee] entered into a knowing and intelligent waiver of her right to bring a PAGA claim . . . or whether *Iskanian* compels a conclusion that such a waiver is unenforceable as against public policy"].)

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[1] Respondent also contends the Arbitration Agreement is substantively unconscionable because Arbonne unilaterally modified it. Respondent waived this issue by failing to raise it in the proceedings below and, as a consequence, the trial court did not make any factual findings necessary for us to consider it on appeal. (*Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1381 ["'Generally, failure to raise an issue or argument in the trial court *waives* the point on appeal'"].)

More to the point, there is sometimes an overlap between the public policy and unconscionability defenses. (*Sonic-Calabasas, supra*, 51 Cal.4th at p. 687.) Such is the case here. As respondent points out, at least one California court has held a PAGA waiver substantively unconscionable. (See *Brown v. Ralphs Grocery Co.* (2011) 197 Cal.App.4th 489, 498-503 (*Brown*) [upholding the trial court's determination a PAGA waiver was unconscionable, and that the PAGA waiver and class action waiver together rendered the entire arbitration agreement unenforceable]; see also *Brown v. Ralphs Grocery Co.* (2018) 28 Cal.App.5th 824, 831 [in *Brown*, "we affirmed the ruling that the PAGA waiver was substantively unconscionable . . . ."].)

We agree with the reasoning in *Brown* on this point and adopt it as our own. It is particularly telling Arbonne ignores the decision in *Brown*, and instead directs our attention to *Poublon v. C.H. Robinson Co.* (9th Cir. 2017) 846 F.3d 1251, 1264 (*Poublon*). The *Poublon* court did hold unenforceability of a PAGA waiver does not make it substantively unconscionable. (*Poublon*, at p. 1264.) But in doing so, it observed: "We are not aware of a California case holding that a PAGA waiver is substantively unconscionable. Nor has Poublon directed us to a case holding that the waiver of a representative claim, other than a PAGA claim, is substantively unconscionable." (*Ibid*.) Evidently, the *Poublon* court was unaware of *Brown*. In any event, as a federal decision on matters of state law *Poublon* is not binding and we decline to follow it. (*Haynes v. EMC Mortgage Corp.* (2012) 205 Cal.App.4th 329, 335.)

Turning to the class action waiver, Arbonne is correct the United States Supreme Court held in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 352 (*Conception*) that the FAA preempts California law to the extent it prohibits class action waivers in consumer arbitration agreements. And the California Supreme Court later extended that rule to class action waivers in employment arbitration agreements, holding any state law prohibition against such class action waivers is also preempted by the FAA under *Conception*. (*Iskanian, supra,* 59 Cal.4th at pp. 366, 384-389.)

Thereafter, courts have consistently enforced arbitration agreements containing class action waivers in accordance with their terms. (See, e.g., *Marenco v. DirecTV LLC* (2015) 233 Cal.App.4th 1409, 1412 [class action waiver enforceable under *Concepcion* and *Iskanian*]; *Johnmohammadi v. Bloomingdale's, Inc.* (9th Cir. 2014) 755 F.3d 1072, 1074 [in light of *Concepcion*, plaintiff cannot argue class action waivers are unenforceable under California law]; and *Epic Systems Corp. v. Lewis* (2018) __ U.S. __ [138 S.Ct. 1612, 200 L.Ed.2d 889] (*Epic*) [FAA requires enforcement of class action waivers in employment agreements].)

Under this well-established law, respondent's contention the class action waiver is substantively unconscionable must fail. He has not directed our attention to any case which supports his contention that a waiver of representative claims, other than PAGA claims, is substantively unconscionable. He cites *Ingle v. Circuit City Stores, Inc.* (9th Cir. 2003) 328 F.3d 1165 (*Ingle*), but that case was decided before *Conception*, *Iskanian*, and *Epic* were decided. Hence, *Ingle* is no longer good law on this point. (See, e.g., *Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 923.)

Respondent also cites *Kinney, supra*, 70 Cal.App.4th at page 1332, for the proposition that class action waivers are substantively unconscionable because they benefit the employer at the employee's expense. But *Kinney* did not address class action waivers at all. The *Kinney* arbitration agreement was so one-sided that it was found to be substantively unconscionable, because it provided only the employee's claims against the employer would be subject to arbitration, while any claims the employer had against the employee were not. (*Ibid*.)

Lastly, respondent suggests the substantive unconscionability of the PAGA waiver makes the class action waiver substantively unconscionable too. Not so. While the parties cannot lawfully agree to waive a PAGA representative action after *Iskanian*, *Concepcion* weighs sharply against concluding the waiver of other representative claims is substantively unconscionable. (See *Poublon, supra*, 846 F.3d at p. 1264.)

For all these reasons, we conclude the PAGA waiver is substantively unconscionable as a matter of law, but the class action waiver is not.

3. Severability and Unenforceability

The issue remains whether the invalid PAGA waiver should be severed and the rest of the Arbitration Agreement should be enforced as requested by Arbonne.[2]

"Generally speaking, when an arbitration agreement contains a single term in violation of public policy, that term will be severed and the rest of the agreement enforced. [Citation.]" (*Gentry v. Superior Court* (2007) 42 Cal.4th 443, 466 (*Gentry*).) "As the court explained in *Armendariz*, *supra*, 24 Cal.4th 83, the determination of whether to sever an invalid contract provision is committed to the discretion of the trial court. 'As noted, Civil Code section 1670.5, subdivision (a) provides that "[i]f the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." Comment 2 of the Legislative Committee comment on section 1670.5, incorporating the comments from the Uniform Commercial Code, states: "Under this section the court, in its discretion, may refuse to enforce the contract as a whole if it is permeated by the unconscionability, or it may strike any single clause or group of clauses which are so tainted or which are contrary to the essential purpose of the agreement, or it may simply limit unconscionable clauses so as to avoid unconscionable results." (Legis. Com. com., 9 West's Ann. Civ. Code (1985 ed.) foll. § 1670.5, p. 494 (Legislative Committee comment).)'" (*Brown, supra,* 197 Cal.App.4th at pp. 503-504.)

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[2] Arbonne's reply memorandum in support of the motion to compel arbitration plainly stated: "Should this Court find that any portion of this arbitration provision is unconscionable, it should sever only that portion of the arbitration provision and save the rest of the arbitration provisions."

In this case, the trial court did not consider whether the PAGA waiver provision, by itself, warranted nonenforcement of the entire Arbitration Agreement. So we reverse and remand for the trial court to exercise its discretion and decide whether to (a) sever the PAGA waiver and enforce the rest Arbitration Agreement, including the class action waiver, or (b) refuse to enforce the Arbitration Agreement as a whole.

This disposition moots the remainder of Arbonne's claims.

DISPOSITION

The order denying Arbonne's motion to compel arbitration is reversed, and the matter is remanded to the trial court with directions to consider whether the PAGA waiver can be severed or the presence of that one provision renders the entire Arbitration Agreement unenforceable. In the interest of justice and because each party prevailed in part, the parties shall each bear their own costs on appeal.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.